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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO DIVISION)

In Re

Case No. 19-30088 DM

PG&E CORPORATION,

CHAPTER 11

and

PACIFIC GAS AND ELECTRIC COMPANY.

Debtors.

**ESC LOCAL 20'S RESPONSE TO
DEBTORS' MOTION FOR ENTRY
OF AN ORDER APPROVING
SHORT-TERM INCENTIVE PLAN
AND GRANTING RELATED RELIEF
(DOC. 782, DOC. 806)**

- Affects PG&E Corporation
- Affects Pacific Gas and Electric Company
- Affects both Debtors

Date: April 9, 2019
Time: 9:30 a.m.
Location: U.S. Bankruptcy Court
Courtroom 17, 16th Floor
San Francisco, CA 94102

*All papers shall be filed in the Lead Case,
No. 19-30088 (DM)*

I. INTRODUCTION

Engineers and Scientists of California Local 20, IFPTE (“ESC Local 20”), the exclusive collective bargaining representative of over 3,700 of Debtors’ professional and technical employees pursuant to a collective bargaining agreement with the Debtors, hereby submits its response to the Motion of Debtors Pursuant to 11 U.S.C. §§ 105(a), 363, and 503(c) for Entry of an Order (I) Approving Short-Term Incentive Plan and (II) Granting Related Relief (Doc. 782, corrected at Doc. 806).

ESC Local 20 supports entry of an order approving the 2019 Short-Term Incentive Plan (STIP) as it relates to ESC-represented employees. ESC Local 20 takes no position on STIP payments to non-represented employees, but with respect to represented employees, PG&E is required to make these payments by the collective bargaining agreement between ESC Local 20 and PG&E.

The STIP payments to ESC Local 20 members are not incentives related to the bankruptcy; they are contractually required payments that workers rely upon as part of their compensation. The employees represented by ESC Local 20 are engineers, estimators, mappers, project managers and other professional and technical employees who are working to modernize and maintain the utility. These are working people, not officers or executives. They gave up wage increases in exchange for STIP payments in their collective bargaining agreement, and now, in negotiations pursuant to 11 U.S.C. § 1113, they have agreed to give up the contractually required STIP payments for 2018 in order to secure the STIP payments for 2019.

Unlike STIP payments to PG&E's executives and managers, the STIP payments to ESC Local 20 members are required by the collective bargaining agreement, and PG&E has a legal duty to honor the terms of that agreement under Section 1113 of the Bankruptcy Code. *Adventure Resources, Inc. v. Holland*, 137 F.3d 786, 796 (4th Cir. 1998) ("[T]he language employed by Congress in § 1113 is unequivocal ... It plainly imposes a legal duty on the debtor to honor the terms of a collective bargaining agreement ... until that agreement is properly rejected." *Id.*; *In re Manor Oak Skilled Nursing Facilities*, 201 B.R. 348, 350 (Bankr. W.D.N.Y. 1996) ("[A]ll aspects

1 of a collective bargaining agreement remain in effect and binding until rejection occurs, including
2 the duty to cure pre-petition arrears.”).

3 Accordingly, this Court should approve the 2019 STIP as it relates to ESC Local 20
4 members.

5 **II. FACTS**

6 **1. STIP payments are part of the negotiated wages and benefits under the**
7 **collective bargaining agreement**

8 ESC Local 20 is a labor union that represents 3,700 professional and technical employees
9 at PG&E, including the engineers, estimators, mappers, project managers, and other professional
10 and technical employees that have been doing the important work needed to maintain and
11 modernize the systems and keep the public utility safe.

12 The terms and conditions of employment for these employees are governed by a collective
13 bargaining agreement between ESC Local 20 and PG&E. Sperry Decl., Ex. A, Ex. B.

14 The collective bargaining agreement requires PG&E to pay certain employees Short Term
15 Incentive Plan (STIP) payments as part of the employees’ compensation. Sperry Decl., Ex. A, pp.
16 viii-x. Approximately 1,396 ESC-represented employees are eligible for these STIP payments.
17 Sperry Decl., ¶ 5. Pursuant to the terms of the collective bargaining agreement, the STIP
18 payments to eligible employees are calculated by multiplying that employee’s eligible earnings
19 by their participation rate, their individual modifier, and the company score. Sperry Decl., Ex. A,
20 p. viii. For nearly all ESC-represented employees who are eligible for STIP payments, the
21 participation rate is currently 10%, meaning that the target level for the STIP payment is 10% of
22 the employee’s yearly base salary.¹ Sperry Decl., ¶ 6. That 10% STIP award is then adjusted up
23 or down by multiplying it by the employee’s individual modifier, which is determined by that
24 employee’s performance rating from their supervisor, and the company score, which is based on
25 company-wide metrics related to safety, reliability of the system, and the company’s financial
26 performance. Sperry Decl., ¶¶ 7-8. These STIP payments are an important part of the

27
28 ¹ For about 10 employees in “Principal Engineer” classifications, the participation rate is 15%.
The participation rate for ESC-represented employees is lower than the participation rate for
managers. Sperry Decl., ¶ 6.

1 employees' compensation, which was bargained for by ESC Local 20. ESC Local 20 members
2 were forced to give up wage increases in exchange for these payments. Sperry Decl., ¶ 10. In
3 bargaining for the 2012-2015 collective bargaining agreement, workers gave up a wage increase
4 of 8.25% and received an increase of only 3% to have STIP phased in over a three year period.
5 *Id.*; Sperry Decl., Ex. C, pp. viii-ix. This was widely understood and agreed to be an exchange of
6 base salary for pay at risk. Sperry Decl., ¶ 10. STIP payments are thus an important part of the
7 employees' wages that the Union bargained for and won.

8 **2. ESC Local 20 agreed to give up 2018 STIP payments in exchange for 2019
9 STIP payments**

10 The STIP payments for 2018 were expected to be paid in March 2019. Sperry Decl., ¶ 14.
11 ESC Local 20 employees would have been entitled to approximately \$29,487,708 in 2018 STIP
12 payments. *Id.*

13 On February 22, 2019, PG&E announced that it would not be making any STIP payments
14 for 2018, and on February 25, 2019, PG&E withdrew the request for authorization of the 2018
15 STIP payments that it had previously made in its Employee Wage and Benefits Motion. Sperry
16 Decl., ¶ 15; Doc. 652, p. 4. The loss of these payments was a significant hardship on ESC Local
17 20 members who rely on these payments to meet their regular cost of living. Sperry Decl., ¶ 17.

18 ESC Local 20 filed a grievance over PG&E's decision not to pay the STIP payments for
19 2018 in violation of the collective bargaining agreement, and objected to PG&E's failure to
20 request authorization to honor its contractual obligations regarding STIP payments to ESC Local
21 20 members. Sperry Decl., ¶ 18; Doc. 646. Specifically, ESC Local 20 argued that PG&E was
22 barred from unilaterally terminating the collective bargaining agreement's requirement to make
23 STIP payments. This was a violation of the collective bargaining agreement, and a violation of
24 Section 1113 of the Bankruptcy Code, which prohibits a debtor in possession from terminating
25 any provision of a collective bargaining agreement prior to negotiating with the union and
26 following the carefully laid out procedures for modification. 11 U.S.C. § 1113(f) (a debtor in
27 possession shall not "unilaterally terminate or alter any provisions of a collective bargaining
28 agreement prior to compliance with the provisions of this section").

1 PG&E and ESC Local 20 then entered into negotiations over the STIP payments. As the
2 result of these negotiations, the parties reached a Memorandum of Understanding to modify the
3 collective bargaining agreement. Sperry Decl., ¶ 20, Ex. E (MOU on STIP awards). ESC Local
4 20 agreed to settle its grievance regarding PG&E's failure to pay the 2018 STIP awards and forgo
5 all payment of 2018 STIP awards in exchange for an increase in participation rates for the 2019
6 STIP awards by 25%. Sperry Decl., ¶ 20, Ex. E. ESC Local 20 also agreed to other
7 modifications of the STIP design, including the switch from annual payment to quarterly
8 payments. Sperry Decl., Ex. E.

9 This modification to the collective bargaining agreement is contingent upon the approval
10 of this Court. Sperry Decl., Ex. E. Should this Court deny this motion with regard to ESC Local
11 20 members, it will constitute a violation of Section 1113, the Union's grievance regarding the
12 2018 STIP payments will be reinstated, the Union will have a claim for the 2018 STIP payments,
13 and the agreed-to modification to the collective bargaining regarding the 2019 STIP payments
14 will be nullified.

15 III. ARGUMENT

16 Section 1113 of the Bankruptcy Code provides special protection to collective bargaining
17 obligations by barring a debtor in possession from modifying or terminating a collective
18 bargaining agreement without engaging with the union in good faith and following the procedures
19 carefully laid out in Section 1113.² This is the exclusive method of terminating any obligations in
20 a collective bargaining agreement. 11 U.S.C. § 1113(a) (a debtor may reject a collective
21 bargaining agreement "only in accordance with the provisions of this section"). "No provisions
22 of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions

23 ² Specifically, section 1113 requires a debtor to make a formal proposal to modify the CBA based
24 on the most complete and reliable information available at the time of the proposal. The proposed
25 modifications must be necessary to permit the reorganization of the debtor, and they must assure
26 that all affected parties are treated fairly and equitably. The debtor must provide the union with
27 all relevant information that is necessary to evaluate the proposal. Between the time of the
28 making of the proposal and the time of the hearing on the motion to reject the existing CBA, the
debtor must meet at reasonable times with the union. At the meetings, the debtor must confer in
good faith in attempting to reach mutually satisfactory modification of the CBA. Only if the
union refuses to accept the debtor's proposal without good cause and the balance of the equities
clearly favors rejection of the CBA may the court allow the debtor to modify or reject the
agreement. See, e.g., *In re American Provision Co.*, 44 B.R. 907, 909 (Bankr. D. Minn. 1984)
(articulating the nine-factor test for modification or rejection of a CBA under Section 1113).

1 of a collective bargaining agreement prior to compliance with the provisions of this section.” 11
2 U.S.C. § 1113(f).

3 “[T]he language employed by Congress in § 1113 is unequivocal.” *Adventure Resources, Inc. v. Holland*, 137 F.3d 786, 796 (4th Cir. 1998). “It plainly imposes a legal duty on the debtor
4 to honor the terms of a collective bargaining agreement … until that agreement is properly
5 rejected.” *Id.*; *In re Manor Oak Skilled Nursing Facilities*, 201 B.R. 348, 350 (Bankr. W.D.N.Y.
6 1996) (“[A]ll aspects of a collective bargaining agreement remain in effect and binding until
7 rejection occurs, including the duty to cure pre-petition arrears.”).

8 Accordingly, PG&E is bound by the collective bargaining agreement’s requirement to
9 make STIP payments to employees represented by ESC Local 20. It is not free to abandon this
10 requirement without engaging in the process required by Section 1113. Absent the Court’s
11 approval of the agreed upon modification of the collective bargaining agreement to terminate the
12 requirement to make STIP payments in 2018 and institute the modified plan for 2019, PG&E is
13 obligated to make the full 2018 STIP payment (and will be bound to make the full 2019 STIP
14 payment).

15 As the Bankruptcy Appellate Panel of the Ninth Circuit has explained, “Section 1113 was
16 enacted to protect employees during the interim between the filing of the bankruptcy petition and
17 court-supervised modification or ultimate rejection of the CBA. During this period, working
18 employees benefit the estate. Their rights accrue as services are rendered *on the basis provided
19 for by the CBA.*” *Teamsters Indus. Sec. Fund v. World Sales (In re World Sales)*, 183 B.R. 872,
20 878 (B.A.P. 9th Cir. 1995) (emphasis added). The debtor’s “employees continued employment
21 post-petition in the ‘reasonable belief’” that the terms of their employment as laid out in the CBA
22 would remain unchanged. *Id.* “We therefore hold that a debtor’s unperformed post-petition
23 obligations under an unmodified or unrejected CBA are beyond the scope of § 365(g), and claims
24 based on such post-petition breaches must be given administrative status.” *Id.* (holding that post-
25 petition obligations to provide healthcare coverage beyond the scope of work performed pursuant
26 to terms of a CBA that had not yet been rejected were entitled to administrative claim status, even
27 though they might not otherwise meet the standards for an administrative claim); *see also In re*

Colorado Springs Symphony Orchestra Assn., 308 B.R. 508 (Bankr. D. Colorado 2004) (finding that pursuant to debtor's obligation under CBA to pay musicians for minimum number of performances, whether or not musician played at all such performances, such payments entitled to administrative status for post-petition period prior to rejection of CBA).

PG&E is required to continue to compensate employees on the terms laid out in the collective bargaining agreement, including STIP payments. STIP payments to ESC Local 20 members must be paid, and the Debtors' motion should be granted with respect to STIP payments to Local 20 members.

IV. CONCLUSION

For the reasons stated herein, ESC Local 20 respectfully requests that the Court grant Debtors' motion with respect to 2019 STIP payments to employees represented by ESC Local 20, authorizing the MOU between ESC Local 20 and PG&E to take effect.

Dated: March 28, 2019

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ Emily P. Rich
EMILY P. RICH

Attorneys for Creditor Engineers and Scientists of California,
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CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on January 30, 2019, I electronically filed the forgoing @ with the U.S. Bankruptcy Court, Northern District California, by using the Court's CM/ECF system.

Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On March 28, 2019, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

SEE ATTACHED SERVICE LIST

On January 30, 2019, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

SEE ATTACHED SERVICE LIST

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on January 30, 2019.

/s/ Stephanie Mizuhara
Stephanie Mizuhara

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